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IN THE

Supreme Court of the United States

October Term, 1951

No. 91

UNITED STATES OF AMERICA, *Appellant*

v.

PERRY HALSETH, *Appellee*

On Appeal from the United States District Court
for the Eastern District of Wisconsin

BRIEF FOR APPELLEE

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INDEX

	PAGE
Jurisdiction	1
Additional Statement of the Case	2
Summary of Argument	3
Argument	4
Conclusion	23
Appendix	24

Citations

Cases:

Affiliated Enterprises v. Waller, 5 A. 2d 251; 1 Terry 28 (Delaware)	19
Bank of Italy v. Bentley, 20 P. 2d 940; 217 Calif. 644	18
Boasberg v. United States, 60 F. 2d 185	8
Bunte Bros. v. Federal Trade Commission, 104 F. 2d 996	9
Cates v. Haderlein, Postmaster, ... U. S. ....., No. 166, October Term, 1951	11
Champion v. Ames, 188 U. S. 321	6
Coolidge v. Choate, 2 Met. 79. 83	20
Crosby-Paige Industries, Inc. v. Jesse M. Donaldson, Postmaster General, Civil Action No. 5193-50, U. S. District Court for District of Columbia	11
Edwards v. American Express Co., 121 Iowa 744, 747, 748	20
France v. United States, 164 U. S. 676, 682	4, 9, 18
Francis v. United States, 188 U. S. 375, 377, 378	8, 9, 18
Hart Publications v. Kaplan, 37 N. W. 2d 814; 228 Minn. 512	20
Helen Ardelle, Inc. v. Federal Trade Commission, 101 F. 2d 718	9
Hill v. Federal Trade Commission, 124 F. 2d 104	9
Horner v. United States, 147 U. S. 449	8
Loughran v. Federal Trade Commission, 143 F. 2d 431	9

PAGE

Martyn v. United States, 176 F. 2d 609, 610 5
McBoyle v. United States, 283 U. S. 25 5
National Candy Co. v. Federal Trade Commission, 104 F. 2d 999 9
Ostier v. Federal Trade Commission, 106 F. 2d 962 9
People v. Postma, 160 P. 2d 221; 68 Cal. App. 2, Supp. 814 19
Post Publishing Co. v. Murray, 230 Fed. 773 (cert. denied 241 U. S. 675) 4
Schmokey v. United States, 182 F. 2d 937 5
Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 10
State v. Howell, 83 Mo. App. 198, 203 20
State v. McNulty, 92 N. E. 2d 839; 228 Ind. 497, 504 20
Steele v. Lawyer, 91 P. 958; 47 Wash. 266 22
Stockton v. United States, 205 Fed. 462 ..... 9, 20
Uniontown Grocery Co. v. Dawson, 68 W. Va. 332; 69 S. E. 845 22
United States v. Bundy, et al, U. S. District Court for the Southern Division of the Northern District of Alabama, No. 10,098, March Term, 1938 19
United States v. Carter, 231 U. S. 492 1
United States v. Farrar, 281 U. S. 624, 634 13
United States v. Fulkerson, 74 Fed. 631 8
United States v. Lem Hoy, 330 U. S. 724, 725 1
United States v. Irvine, 156 Fed. 376 18
United States v. MacDonald, 65 Fed. 486, 488 ..... 2, 18
United States v. Mason, 22 Fed. 707 8
United States v. McGuire, 64 F. 2d 484 (cert. denied 290 U. S. 645) 4
United States v. Mueller, 178 F. 2d 593 8
United States v. Noelke, 1 Fed. 426 8
United States v. Norton, 179 F. 2d 527, 529 4
United States v. Rich, 90 F. Supp. 624 20
United States v. Swift, 318 U. S. 442, 445 1
United States v. Thind, 261 U. S. 204, 209 5
United States v. Wayne Pump Co., 317 U. S. 200, 203 1

PAGE

United States v. Williams, et al, 341 U. S. 70, 82 5
United States v. Zeisler, 30 Fed. 499 8
Viereck v. United States, 318 U. S. 236, 241, 243 4
Wertz Novelty Co. v. Chandler, 20 F. Supp. 774 19
Western Union Telegraph Co. v. Schriver, 141 Fed, 538 18

Statutes:
Act of July 27, 1868, 15 Stat. 194, 196 5
Act of June 8, 1872, 17 Stat. 302 5
Act of September 19, 1890, 26 Stat. 465 5
Act of March 2, 1895, 28 Stat. 963 6, 14
Act of March 4, 1909, 35 Stat. 1136, 1129 6
Act of September 26, 1914, 38 Stat. 719 9
Act of March 21, 1938, 52 Stat. 111 9
Act of June 25, 1948, 62 Stat. 762 6
Act of January 2, 1951, 64 Stat. 1134 16, 20

Administrative Procedure Act of 1946, 60 Stat. 237, as amended 11
5 U. S. C. 1001, et seq 11
15 U. S. C. A. 1171 et seq 20
18 U. S. C. 336, 1940 ed. (now Section 1302) 2, 6, 7, 10, 13, 26, 28, 29, 31
18 U. S. C. 337 (now Section 1303) 6, 7
18 U. S. C. 387, 1940 ed. (now Section 1301) 6, 7, 13
13 U. S. C. 682, 1940 ed. (now Section 3731) 1
28 U. S. C. A. 345 (now Section 1252) 1
39 U. S. C. 259 5, 6, 7, 11, 26, 28, 29, 31
39 U. S. C. 732 6, 11, 26, 28, 29, 31

Miscellaneous:
Congressional Record, Vol. 7 pt. 4, p. 3013 7
Hearings, Feb. 18, 1926, Subcommittee of Committee on Post Office and Post Roads, House of Representatives, 69th Cong., 1st Sess., on H. R. 6922 10
Hearings, Mar. 27, 1928, Committee on Post Office and Post Roads, U. S. Senate, 70th Cong., 1st Sess., on S. 2751 10
Hearings, Apr. 21, 1932, Subcommittee of Committee on Post Office and Post Roads, U. S. Senate, 72nd Cong., 1st Sess., on S. 182 10

PAGE

Hearings, April, May and June 1950, Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S. 3357 and H. R. 6736 ..... 15, 16, 17, 24
Hearings, Sept. 19, 20, and 21, 1951, Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624 14, 15, 16
House of Representatives, Bill H. R. 4796, 75th Cong. 15
House of Representatives, Bill H. R. 6736, 81st Cong., 2nd Sess. 16, 24
House of Representatives, Report No. 2769, 81st Cong., 2nd Sess., on S. 3357 6
Huron Sales Company, In the Matter of, before Post Office Department, Specification of Charges, dated January 13, 1947 29-30
Huron Sales Company, In the Matter of, before Post Office Department, Order of Dismissal, dated January 30, 1948 31
Letter of Attorney General, April 21, 1937 15
Letter of Attorney General, April 20, 1950 6
Letter of Postmaster General, September 19, 1951 16
Monarch Sales Company, In the Matter of, before Post Office Department, Specifications of Charges, dated January 8, 1947 26-27
Monarch Sales Company, In the Matter of, before Post Office Department, Order of Dismissal, dated January 30, 1948 28
22 Ops. A. G. 198 9
Restatement Law Agency, Sec. 1, p. 7; Sec. 15, p. 50 22
Senate Bill, S. 3357, 81st Cong., 2nd Sess. 16, 24
Senate Bill, S. 1624, 82nd Cong., 1st Sess. 13
Senate Report No. 928, 82nd Cong., 1st Sess., on S. 1624 ..... 14, 32

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BRIEF FOR APPELLEE

Jurisdiction

Probable jurisdiction was noted by this Court on October 8, 1951 (R. 30). It is respectfully submitted that the order of the District Court dismissing the indictment is more in the nature of a decision that the indictment fails to state an offense, rather than a decision on the validity or construction of the statute.[1] The decision is

[1] In *United States* v. *Lem Hoy*, 330 U.S. 724, 725, cited by appellant, the dismissal of the information was grounded on the invalidity of the statute; this Court in addition to 18 U.S.C.A. 682 (now Section 3731) also citing 28 U.S.C.A. 345 (revised into present Section 1252, entitled "Direct Appeals from Decisions *Invalidating* Acts of Congress). See also, *United States* v. *Carter*, 231 U.S. 492; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 203; *United States* v. *Swift*, 318 U.S. 442, 445.

predicated upon stipulated facts (R. 5, 19). The appellant concedes (Brief, p. 3) that: "The District Court held that if the indictment had alleged the additional facts contained in the exhibits attached to the stipulation, it would not have charged an offense under the statute." The Government's entire case admittedly rests on such facts. Thus the order of dismissal has most of the characteristics of a directed verdict of not guilty on the Government's evidence, from which no appeal would lie. The court merely applied the admitted facts before it and, in effect, ruled that the indictment was defective because such facts were not sufficient to show or prove first, that the scheme alleged was in fact a lottery offering prizes dependent in whole or in part upon lot or chance, and therefore the circular letter complained of did not in fact "concern" a lottery. Cf. *United States v. MacDonald*, 65 F. Fed. 486, 488.

Additional Statement of the Case

Exhibits R-2 (R. 9) and C-2 (R. 15) are incomplete in that the reverse thereof is not reproduced in the record, although referred to in haec verba in the lower court's opinion (R. 21).[2]

The indictment (R. 1, 2, 3) fixes the time of the commission of the several alleged offenses as between March 27, 1948 and June 15, 1948. The indictment was filed May 9, 1949 (R. 1) and refers to "Former Section 336, Title 18 U. S. C., Now Section 1302, Title 18 U. S. C." The latter section became effective September 1, 1948.

The record fails to disclose that the envelopes, namely Exhibit R (R. 7) and Exhibit C (R. 13), containing the other exhibits, were mailed under third-class postal permit at Chicago, Illinois, and were unsealed to permit of

[2] Also set out in the Government's brief, pp. 6, 7.

postal inspection in conformity with postal rules and regulations pertaining to third-class mail matter.

The record fails to show that defendant, in addition to the grounds set forth in the motion to dismiss (R. 3, 4), raised the following additional objections[3] to the indictment:

> "7. The defendant is being prosecuted under a section of the United States Code which was not in effect at the time stated in the indictment.
>
> "8. The venue is improper, since the circular letter complained of was not mailed within the jurisdiction of the court, but was mailed at Chicago, Illinois.
>
> "9. The indictment does not comply with Rule 7 of the Federal Rules of Criminal Procedure, in that it was not signed by the Attorney for the Government but by an assistant in the office of the United States Attorney for this district." See (R. 3).

Summary of Argument

I

The statute must be strictly construed.

II

The statute was not designed or intended by Congress to apply to the mailing, or advertising by mail, of articles which might or could be used by the recipient to conduct a lottery.

III

There was no lottery in existence either at the time of mailing or at the time of receipt of the literature, and none of the literature complained of, therefore, is a "circular concerning any lottery . . . offering prizes de-

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[3] The lower court (R. 21) referred to this group of objections as resting on technical grounds, but did not pass upon same.

pendent in whole or in part upon lot or chance . . ." as alleged in the indictment. The circular in question is not employed as a means to further or conduct any form of lottery.

IV

There is no offer submitted to, or solicitation made of, the addressee to act as a salesman or agent of defendant in the distribution of lottery tickets.

ARGUMENT

I

The Statute Must Be Strictly Construed.

The statute under which the Government seeks to convict defendant is criminal and must be strictly construed.

Post Publishing Co. v. *Murray*, 230 Fed. 773 (cert. denied 241 U. S. 675);
France v. *United States*, 164 U. S. 676, 682;
United States v. *McGuire*, 64 F. 2d 485 (cert. denied 290 U. S. 645).

Appellant's contention[4] that the case may be properly decided upon the *broader* construction that the statute prohibits the mailing of a circular offering lottery paraphernalia upon an outright sale basis, is untenable, for no offense may be created in a criminal statute except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses.

Viereck v. *United States*, 318 U. S. 236, 241, 243;
United States v. *Norton*, 179 F. 2d 527, 529.

A criminal statute must be strictly construed and not extended in its operation to persons not within its descriptive terms or the fair and clear import of the language used.

[4] P. 35, Government's Brief.

Schmokey v. *United States*, 182 F. 2d 937;
Martyn v. *United States*, 176 F. 2d 609, 610.

Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms.

United States v. *Williams, et al*, 341 U. S. 70, 82.

It is well settled that when a rule of conduct is laid down in words that evoke in the common mind a fixed picture, the statute should not be extended simply because it may seem, to a prosecutor or a court, that another policy might apply, or upon the speculation that if the legislature had thought of it at the time of enactment, broader words would have been used.

McBoyle v. *United States*, 283 U. S. 25 (citing *United States* v. *Thind*, 261 U. S. 204, 209).

II

The Statute Was Not Designed or Intended to Apply to the Mailing or Advertising by Mail of Articles Which Might or Could Be Used by the Recipient to Conduct a Lottery.

The statutory language here involved first appeared in the Act of July 27, 1868 (15 Stat. 194, 196), making it unlawful to deposit material concerning lotteries in the mails, but fixing no penalty. Section 3894, Revised Statutes, Act of June 8, 1872, Chapter 335, Section 148 (17 Stat. 302) reenacted the prohibition except that the statute was directed against "illegal" lotteries and penalties for violation were fixed. By the Act of September 19, 1890, Chapter 908, Section 1 (26 Stat. 465), the Section was amended and the word "illegal" was deleted therefrom. In the same amendatory Act, Section 2 thereof amended Section 3929, Revised Statutes (now 39 U. S. C. 259), relating to the Postmaster General's power to issue so-called fraud orders against the conduct of lotteries and fraudulent

schemes through the mails, and Section 3 amended Section 4041, Revised Statutes (now 39 U. S. C. 732), relating to the Postmaster General's power to forbid payment of money orders drawn to the order of persons or concerns so engaged.

By the Act of March 2, 1895, Chapter 191 (28 Stat. 963), the so-called Anti-Lottery Legislation was enacted. Section 1 thereof is the present Importation and Interstate Lottery Carriage Section (now 18 U. S. C. 1301), and also prohibited deposit of advertisements of such lotteries in the mails; Section 2 invoked the provisions of Sections 3929 and 4041, Revised Statutes, supra (39 U. S. C. 259 and 732); Section 3 specifically retained Section 3894, Revised Statutes, supra (formerly 18 U. S. C. 336, 1940 ed., and now 18 U. S. C. 1302); and Section 4 extended the provisions of the Act of 1890 to ordinary mail matter as well as to registered letters.

The legislation has remained basically unchanged since 1895,[5] Sections 1 and 3 being incorporated into the Criminal Code by the Act of March 4, 1909, Chapter 321, as Section 237 (35 Stat. 1136) and Section 213 (35 Stat. 1129) respectively, appearing in Title 18, United States Code (1940 ed.), as Sections 387 and 336 respectively, and by the Act of June 25, 1948, into the Revised Title 18, United States Code, as Sections 1301 and 1302 respectively, effective September 1, 1948.

All three "lottery" statutes are thus in pari materia—all relating to the same subject matter and designed to ban the same thing, namely lotteries in interstate commerce and in the mails, with all having the same basic legislative origin. The manager of the bill (Representa-

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[5] ". . . the legislation passed upon in the Lottery Case [*Champion v. Ames*, 188 U.S. 321] is still the existing Congressional policy regarding lotteries (18 U.S.C. 1301-1303)." Letter of Attorney General, April 20, 1950, appearing on p. 13, H. R. Report No. 2769 to accompany S. 3357, 81st Cong., 2nd Sess.

tive Broderick) explained to Congress in recommending its passage, that the one *lottery* in the United States after having been driven out, had reorganized in Honduras and had been operating from that territory throughout the States of the Union. Vol. 7 pt 4, Congressional Record, page 3013.

The fraud order section (39 U. S. C. 259) includes the words, as the gravamen of the offense, "*engaged in conducting* any lottery, etc."

The companion criminal statute here involved contains, inter alia, the words "any letter, package, postal card, or circular concerning any lottery . . . offering prizes dependent in whole or in part upon lot or chance." The Government bases its case upon this part of the section.[6]

In its previous form as Section 336 of Title 18, United States Code (1940 ed.), which was in effect when the mailings were delivered prior to June 15, 1948 (R. 1, 2. 3), the section provided that none of the items named therein "shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier." Parenthetically, it should be observed that the following Section 1303 of Title 18, United States Code (1948 Rev.), makes it an offense for any employee of the postal service to knowingly deliver "any letter, package, postal card, circular, or pamphlet advertising any lottery . . ."

The two criminal sections (now Sections 1301 and 1302 of Title 18 U. S. C.) and the civil sanction section (39 U. S. C. 259) have been interpreted judicially and administratively, to apply only to going lotteries, i.e. lotteries which are already set up and in existence, and in which the basic elements of an otherwise legal contract are present, including competent parties (a promoter or un-

[6] Appellant's Brief, p. 9.

derwriter and a player-customer), consideration, offer and acceptance.

As was said by this Court in *Francis* v. *United States*, 188 U. S. 375, 377, 378:

> "A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the *contract* with the lottery as a document of title." (Emphasis supplied).

In a general sense "lottery tickets" are more in the nature of choses in action . . . being in some respects memoranda of conditional promises to pay."

United States v. *Mueller*, 178 F. 2d 593.

In addition to consideration, chance and prize are the three elements necessary to constitute a lottery, all of which must be present.

Horner v. *United States*, 147 U. S. 449.

All of the earlier district (circuit) court cases brought under the statute in question and relied upon by appellant,[1] relate to lotteries already set up and in existence where the mails were used in the "conduct" of same. except that in *United States* v. *Mason*, 22 Fed. 707, the Court held that even in the face of a going lottery the statute could not be applied broadly and literally to the acts of a customer who wrote to the lottery operator ordering tickets in his lottery. The same is true as to *Boasberg* v. *United States*, 60 F. 2d 185, where the lottery was set up and offers to participate were made by the promoter through the mails. As pointed out by the court below in the instant case (R. 23), there is a substantial difference between that case and this, because

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[1] *United States* v. *Noelke*, 1 Fed. 426; *United States* v. *Zeisler*, 30 Fed. 499; *United States* v. *Fulkerson*, 74 Fed. 631; *United States* v. *Mason*, 22 Fed. 707.

here no offer was made by this defendant to the addressee, whereby the latter in exchange for a payment to defendant of an undetermined amount would be allowed to select a girl's name, which if drawn by lot by defendant from amongst other girls' names, would entitle him to a prize.

The Federal Trade Commission cases cited in the footnote on page 15 of appellant's brief are not in point, involving as they do decisions growing out of the civil law of unfair competition under Section 5 of the Federal Trade Commission Act of September 26, 1914 (38 Stat. 719)[8] as amended by the Act of March 21, 1938 (52 Stat. 111).[9]

Sometime after the decisions of this Court in *France* v. *United States*, (supra), and *Francis* v. *United States*, (supra), and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Stockton* v. *United States*, 205 Fed. 462, and on the basis of the opinion of the Attorney General of the United States (22 Ops. A. G. 198), the law enforcement authorities of the Government for several years initiated or supported efforts[10] to obtain legislative authority to bring devices such as push cards and punchboards within the proscription of the anti-lottery mail statutes, including an amendment to the instant statute adding the following words to the first sentence: "or concerning any article, device or thing designed or intended for the conduct of such lottery, gift en-

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[8] *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718; *Bulte Bros.* v. *Federal Trade Commission*, 104 F. 2d 996; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999.

[9] *Ostler* v. *Federal Trade Commission*, 106 F. 2d 962; *Hill* v. *Federal Trade Commission*, 124 F. 2d 104; *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431.

[10] See Appendix, p. 24, for composite list of proposed but unsuccessful legislation.

terprise or scheme." The adoption of such language was advocated if pushcards and punchboards were to be brought within the prohibition of the Postal Anti-Lottery Statutes.[11] A Post Office Department spokesman appearing in favor of such amendment stated, ". . . the Department has for years taken the position that these devices, consisting of punchboards and prizes to be awarded by means of punchboards are not unmailable since they are not in fact lotteries until they are set up for operation."[12] The Postmaster General in his annual reports to Congress for years prior to 1932 recommended enactment of such an amendment to the present mail lottery statute

Official statements and recommendations by representatives of the Executive Branch to Congress in their testimony before Congressional Committees may be considered by the courts in interpreting an act.

Standard Oil Co. v. *Federal Trade Commission*, 340 U. S. 231 (Jan. 1951).

The statute remained unchanged until 1948, when it was revised into Section 1302 of Revised Title 18, United States Code. By administrative interpretations and rulings until November 1950, the plan of business for which defendant was indicted has had unrestricted access to

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[11] P. 4, Hearings, *Feb. 18, 1926*, before Subcommittee of the Committee on the Post Office and Post Roads, House of Representatives, 69th Cong., 1st Sess., on *H. R. 6982*, a Bill to Amend Criminal Code Title 18, Sec. 336, U.S.C., affixing penalties for use of the mails in connection with lottery paraphernalia; P. 3, Hearings, *Mar. 27, 1928*, before the Committee on Post Office and Post Roads, U. S. Senate, 70th Cong., 1st Sess., on *S. 2751*, a Bill to Amend Criminal Code Title 18, Sec. 336, U.S.C., affixing penalties for use of the mails in connection with lottery paraphernalia; P. 18, Hearings, *Apr. 21, 1932*, before Subcommittee of the Committee on Post Offices and Post Roads, U. S. Senate; 72nd Cong., 1st Sess., on *S. 182*, a Bill to Amend Criminal Code Title 18, Sec. 336, U.S.C., affixing penalties for use of the mails in connection with lottery paraphernalia.

[12] Hearings on S. 2751 (1928) and S. 182 (1932), referenced in Footnote 11, supra.

the mails without interference by the Postmaster General under the companion fraud order statute or under the non-mailable provision of the instant statute. In the latter year, the then Solicitor for the Post Office Department, twenty months after issuing a complaint, caused to be issued a "fraud order" under Title 39, United States Code, Sections 259 and 732, against a concern engaged in an almost identical plan of business, the enforcement of which was enjoined pendente lite by the United States District Court for the District of Columbia.

Crosby-Paige Industries, Inc. v. *Jesse M. Donaldson, Postmaster General,* Civil Action No. 5193-50, U. S. District Court for the District of Columbia.

It was the same Solicitor, who authored the "policy" enunciations quoted in Appellant's Brief at page 33—inter-office memoranda which have none of the dignity of an officially published ruling—the first of which preceded by two days the dismissal by that same official's office of two cases involving the identical plan and the same statute,[13] and the second of which followed twelve days later, informing postmasters that such material was not to be treated as non-mailable. Parenthetically, it should be observed that it was this same official who, as Chief of the Law Division of the Post Office Department, was responsible for the unlawful denial of the right of due process of law to litigants before his office charged with violation of the so-called fraud order statute, by refusing to recognize and apply the provisions of the Administrative Procedure Act of 1946 (60 Stat. 237, as amended; 5 U. S. C. 1001 et seq.). That refusal has now been repudiated in *Cates* v. *Haderlein, Postmaster,* ..... U. S. ....., No. 166, October Term 1951, certiorari granted October 8, 1951; reversing 189 F. 2d 369 and remanding on respondent's confession of error.

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[13] See Appendix, pp. 26-31.

The Government conceded in the court below, that the mailing of the pushcard in itself would not be a violation of the statute, apparently because in itself it is not a lottery and could not be used to conduct a lottery until someone set it up for operation as such. Since the circular letter accompanying the card contains the same information appearing on the card, how can it then be said that the circular letter "concerns" a lottery? Following the Government's line of reasoning a step farther, it can be assumed, arguendo, that there would be no offense if the two pieces of paper were mailed separately. In combination, exactly the same result obtains. Since the card itself is not a lottery, the circular letter referring to it does not "concern" a lottery.

The Government further argues here (Brief, p. 29 et seq.) that doubts of the Post Office Department (as to whether the statute applied to punchboards) seem to have been limited to the outright sale of boards by manufacturers, or at most to the outright and completed sale of the boards and prizes. In other words, if defendant had offered to sell one article of merchandise and one pushcard (which he does not do), there would be no violation. How then can it be now said that the giving away of a pushcard, as an advertising stunt to attract the reader's attention to defendant's merchandise, does greater violence to the intent of the law, merely because the circular letter accompanying the card "concerns" the card? The circular letter "concerns" the outright sale of merchandise—not a lottery. It is submitted that the background of the Department's official position and the position of the Department of Justice, establishes that an even closer approach to a lottery—a sale of lottery paraphernalia to one intending to put it to use—has never been considered a violation.

The attempted stretching of language having a definite and established meaning in an effort to justify a reversal

of a position previously adopted for more than thirty years, is best answered by pointing out that administratively the Department had the power and the duty to refuse in the first instance to accept for mailing any material concerning lotteries, gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance, for the instant statute in its previous form (18 U. S. C. 336, 1940 ed.) declared, inter alia, that such material shall not be deposited in the mails or delivered by any postmaster or letter carrier. The material here involved was admitted to the mails and delivered to the addressee notwithstanding the fact that the unsealed envelopes, as well as the cards, were subject to inspection at all times by the Post Office representatives under the third-class mailing permit granted by the Department.

Where, during the entire life of a statute, the executive departments charged with the administration and enforcement of an Act of Congress, have uniformly construed it as not including a given situation and where no prosecution has been successfully undertaken upon a different theory and Congress, well aware of the construction and practice, has significantly left the law in its original form, it follows that no offense is charged, when a different theory is later asserted.

United States v. *Farrar*, 281 U. S. 624, 634.

The position of the Government in bringing the indictment and this appeal, is incongruous. There is now pending before the Congress a Bill (S. 1624, 82nd Cong., 1st Sess.) prohibiting the importation, transportation, and mailing of gambling materials, etc., which Bill was favorably reported out by the Senate Committee on Interstate and Foreign Commerce on October 8, 1951. This Bill amends the instant statute (Section 1302) and the companion Section 1301 of Title 18, United States Code

(1948 rev.); reenacts the present language as a combined new Section 1301, and adds the words "gambling enterprises" to the present language, as well as specifically creating a new category of offending material by adding the words "punchboard" and "pusheard" and advertisements thereof. "S. 1624 revises the lottery law (Act of May (sic-March) 2, 1895) to include within its prohibitions other gambling enterprises, and punchboards and pushcards designed for gambling . . ."[14]

In the hearings before the subcommittee, the Attorney General of the United States and his assistants have stated, "Sections 1301 and 1302 of Title 18 . . . have been construed by the courts to be applicable only to lotteries and schemes having the characteristics of lotteries."[15] Suggestions were offered to distinguish between "punchboard" and "pushcard"—a representative of the Criminal Division, Department of Justice, stating, "A pushcard is a cardboard form usually transmitted in the mail . . ."[16]

Representatives of the Attorney General not only on the one hand seek a "broader" interpretation of the instant statute from this Court, at the same time tacitly representing to Congress that the existing statute does not encompass the activity in question, but go further and say to a Congressional committee proposing to amend this statute to include mailing of pushcards so as to prevent local use thereof, that: "There is some question as to the extent to which the Federal Government should

[14] P. 2, Report No. 928, Calendar No. 879, to accompany S. 1624, 82nd Cong., 1st Sess.; Appendix, p. 32; see also p. 6 for Committee's comparison of proposed changes in existing Law.

[15] P. 21, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

[16] Ibid., p. 23.

get into a purely local field and something which has been heretofore pretty much purely a local field. If there is any reservation as to this bill, it is solely from that standpoint. The Department supports the object of the bill . . ."[17] Nothing was said or even remotely suggested with respect to the contention of the Department of Justice advocated in this case, that the instant statute serves the same purpose. See also letter of Attorney General dated April 21, 1937 with respect to H. R. 4796, 75th Congress,[18] in which the Attorney General expressed doubt as a matter of general policy that the Federal Government should undertake to legislate on the subject of transportation of gambling devices instead of leaving the matter to state and local regulation, and criticized as broad and indefinite the definition of "gambling device" in the bill because it would be difficult to determine what articles would come within its scope, such as playing cards and dice.[19]

In addition, the present Solicitor of the Post Office Department, who was Associate Solicitor when the events heretofore recited (supra, p. 11) took place, testified before the Committee, as follows:[20] "It is our position that in order that there be no question about the intention of Congress with respect to what is to be covered by the bill, that consideration be given to using general

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[17] P. 24, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

[18] Referred to in Appendix, p. 24.

[19] P. 260, Hearings, Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S. 3357 and H. R. 6736, Prohibition of Gambling Devices in Interstate Commerce, April, May and June 1950.

[20] P. 63, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

words which would include every article, matter, thing, device or substance. We are afraid that if Congress attempts to specifically enumerate any of the articles by name and should any article be left out, the courts might then hold that the leaving out of this particular article meant that Congress intended that it was not to be covered.". The Postmaster General by letter to the Committee dated September 19, 1951, suggested the substitution of the language "purchase of, or in payment of any chance taken on any punchboard, pushcard or similar device," because he felt that the reference in the bill "for the purchase of any punchboard, pushcard or similar device" might well, as written, "be interpreted to apply only to the initial price paid by the purchaser of the entire punchboard or pushcard from the manufacturer or other distributor."[21]

When the bill (H. R. 6736, 81st Cong., 2nd Sess.) which, with S. 3857, finally became the Anti-Slot Machine Act of January 2, 1951 (64 Stat. 1134; 18 U. S. C. 1171), was under consideration in hearings before the Committee on Interstate and Foreign Commerce, a member of the Committee asked if the House bill included punchboards and was told by the author of the bill that it did, under the category of "apparatus."[22] The legislation as finally enacted, so restricted the definition of "gambling device" as to apply only to coin-operated slot machines.[23] A representative of the Solicitor General stated: "Actually, the bill that was before the conference on March 16 spe-

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[21] P. 62, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

[22] P. 28, Hearings, April, May and June 1950, before Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S. 3357 and H. R. 6736.

[23] Ibid., p. 51.

cifically included punchboards. But the conference struck it out, not because it was against hitting at those, but it was feared that the breadth of the definition might include so much as to make this bill really unworkable."[24]

Why then does the Attorney General and his assistants, together with the law officers of the Post Office Department, support and recommend new legislation to cover the mailing of punchboards and pushcards on the grounds that the present statutes do not apply, and almost concurrently other assistants urge before this Court that the instant statute covers the matters now pending before Congress?

The Congressional intent is clear. The instant statute does not embrace as a lottery the plan of business here involved. The Congress for many years has refused to enact amendatory legislation which would bring within the orbit of the statute the mailing of circulars, etc., concerning paraphernalia and devices which later could be used for lottery and gambling purposes. The reason is apparent. Congress did not then want to encroach upon state law enforcement policies.

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[24] Ibid., p. 52.

II

There Was No Lottery in Existence Either at the Time of Mailing or at the Time of Receipt of the Literature, and None of the Literature Complained of, Therefore, Is a "Circular Concerning Any Lottery . . . Offering Prizes Dependent in Whole or in Part Upon Lot or Chance . . ." as Alleged in the Indictment. The Circular in Question Is Not Employed as a Means to Further or Conduct Any Form of Lottery.

Counsel has been unable to find any reported Federal decision which even remotely holds that material which in the future could be used by the person in possession to set up a lottery or a gambling enterprise, is in itself a lottery in violation of the Federal lottery statutes when sent through the mails or transported in interstate commerce. The absence of reported decisions sustaining an alleged liability under a given set of facts raises a strong presumption that no such liability exists.

Western Union Telegraph Company v. Schriver, 141 Fed. 538;
Bank of Italy v. *Bentley*, 20 P. 2d 940; 217 Calif. 644.

On the other hand, while it is persuasive that no reported decision can be found to even remotely support the position of appellant, yet all decisions of the Federal courts known to counsel on the subject of lotteries in the mails and in interstate commerce, as well as administrative interpretations of the three Federal lottery statutes hold that it must be alleged and proved that a lottery must be set up and in existence at the time charged.

France v. United States, supra;
Francis v. United States, supra;
United States v. Irvine, 156 Fed. 376;
United States v. MacDonald, supra.

In *United States v. Bundy, et al*, No. 10,098, March Term 1938, an unreported decision of the District Court of the United States for the Southern Division of the Northern District of Alabama, an indictment under the same statute, involving the same plan of business as now before the Court, was dismissed on demurrer, the grounds for which are the same as here involved. No appeal was taken by the United States.

To have a going lottery, there must be present all of the elements thereof (supra, p. 8). For a circular to "concern" a lottery, there must be a lottery conforming to the required elements. The mailing in question offers no "chance ticket" to the recipient in exchange for a consideration, and offers him no prize, the award of which is dependent in whole or in part upon lot or chance. Defendant conducts no drawing and does not offer to do so. He merely offers to sell merchandise at a fixed price.

At common law, lotteries were recognized as legal, but were merely tolerated and were not approved.

Werts Novelty Co. v. *Chandler*, 20 F. Supp. 774.

"Gaming," "betting" and lotteries are separate and distinct things in law and in fact.

People v. *Postma*, 160 P. 2d 221; 68 Cal. App. 2, Supp. 814.

Any lottery scheme consists merely of a number of offers and acceptances upon consideration.

Affiliated Enterprises v. Waller, 5 A. 2d 251; 1 Terry 28 (Delaware).

To "make" in statute declaring it a crime to "make" or "draw" any lottery scheme or gift enterprise, means the setting up of a lottery and "draw" means the actual drawing to determine to whom the prizes shall be awarded.

State v. McNulty, 92 N. E. 2d 839, 842; 228 Ind. 497, 504.

Statutes prohibiting lotteries are devised to punish persons who actually operate or contrive to operate the lottery, rather than those who prepare material used in the lottery.

Hart Publications v. Kaplan, 37 N. W. 2d 814; 228 Minn. 512.

Even long-recognized gambling or betting transactions when conducted through the mails, (commonly known as "book-making,") have been held not to be within the meaning of the statute. "To hold otherwise would be to read into the statute a meaning that is not therein express, and that would be judicial legislation."

United States v. Rich, 90 F. Supp. 624.

The use to which a punchboard or other device is put is the only test as to whether it is a gambling device. The principal distinction lies in the manner of usage when used—not in design, construction, or possibility.

Coolidge v. Choate, 2 Met. 79, 83 (an early Massachusetts, case);
State v. Howell, 83 Mo. App. 198, 203;
Edwards v. American Express Co., 121 Iowa 744, 747, 748;
Stockton v. *United States*, (supra), 464, 465, 468.

Congress has now prohibited the use of the channels of interstate commerce in the shipment of gambling devices, but has specifically and in detail restricted the definition to mechanical pay-off coin-operated machines—so-called "slot machines."

Act of January 2, 1951, ch. 1194, 64 Stat. 1134, 15 USCA 1171 et seq.

IV

There Is No Offer Submitted to, or Solicitation Made of, the Addressee to Act as a Salesman or Agent of Defendant in the Distribution of Lottery Tickets.

The persons to whom the circulars are mailed are not agents of defendant either at the time of such mailing or at the time of receipt and would not become agents even though they operated the punchcard. There is no contract between defendant and the persons receiving the advertising literature, no consideration is passed and the recipient owes no obligation whatsoever to the defendant nor does the defendant owe any obligation whatsoever to him except perhaps to send him merchandise (if he elects to buy from defendant at the price offered) upon the receipt by defendant of an order accompanied by the price of such merchandise. The recipient, if he elects to invite others to take punches, may use any merchandise he pleases as prizes and he may buy it from any merchant he pleases and the defendant cannot complain. Any person using the card is completely independent of the defendant at all times and his discretion is limited in no way whatsoever by any undertaking, contract or understanding with the defendant. He can even alter the pushcard by obliterating any printing appearing thereon. Defendant conducts no drawing, does not know, and is not concerned with the result, of any drawing conducted by someone else. All he does is sell goods to those ordering same and for cash. The goods are not sent on consignment and no credit is extended. There is no commission involved, no report required and no representation arranged for. The transaction lacks all the requirements of the relationship of principal and agent or of master and servant. To create the relation of principal and agent there must be a contract of employment inferred or implied.

Uniontown Grocery Co. v. Dawson, 68 W. Va. 332; 69 S. E. 845.

Agency has been defined as a relationship founded on contract, express or implied, or created by law by which one is authorized to act for another in business dealings with third persons.

Steele v. Lawyer, 47 Wash. 266; 91 P. 958.

The Restatement of the Law of Agency gives the following definition of "agency":

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act in his behalf and subject to his control, and consent by the other so to act." (A. L. I. Restatement of the Law of Agency, Section 1, page 7).
>
> "An agency relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." (Supra, Section 15, page 50).

The mailing piece in question makes no offer to employ the addressee as a salesman for, or agent of, defendant. Even though it be argued that it was the intention of defendant to suggest such employment (which is denied), there could be no such employment until the recipient affirmatively accepted, for "employment" can only come about through an agreement which satisfies the legal requisites of a valid contract. While there is no allegation that the addressees named in the indictment ever used the pushcards for any purpose, yet if such were the fact, then that person could only operate on his own, independently of defendant, and there is no presumption that even then he used the card in an unlawful manner. For example, a person recognizing the bargain qualities of the merchandise offered, could take all the punches on the card and thereby eliminate any element of chance

CONCLUSION

It is respectfully submitted that the appeal in this case should be dismissed, or in the alternative, that the decision of the United States District Court for the Eastern District of Wisconsin, should be affirmed.

HORACE J. DONNELLY, JR.

Counsel for Appellee

Of Counsel:

BRUNO V. BITKER
Of Bitker & Marshall
Milwaukee, Wisconsin

November 21, 1951.

APPENDIX

Excerpt from Hearings, April, May and June 1950, before Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S 3357 and H. R. 6736; pp. 259-260:

The Congress Has Consistently Refused to Enact Any Such Law as That Here Proposed.

The Congress has on numerous occasions determined that it should not enact any bill on the subject dealt with in S. 3357 and H. R. 6736, evidently feeling that it should leave the subject to the States and municipalities.

From May 1919 to January 1941, the Congress had before it many bills on the subject covered by S. 3357 and H. R. 6736. On one occasion one House passed such a bill, and on another occasion the other House passed one. Extended hearings were held on some of these bills. Most of them ended in the committees. They were as follows:

Sixty-sixth Congress—S. 1541, Senator Sheppard. To bar gambling devices and lottery paraphernalia from the mails.

H. R. 1195, Representative Randall. To enable the Postmaster General to forbid payment of money orders in connection with exclusion from the mails of fraudulent gambling devices and lottery paraphernalia.

Sixty-eighth Congress—H. R. 6071, Representative Purnell. To prohibit importation and interstate transportation of gambling or chance slot machines or automatic vending machines or devices connected with chance devices.

Sixty-ninth Congress—H. R. 3935, Representative Purnell, Reintroduction of above.

H. R. 4004, Representative Dyer. To punish the unlawful transportation in interstate commerce or through the mails of gambling machines and fraudulent devices.

Seventieth Congress—H. R. 387, Representative Dyer. Reintroduction of above.

Seventy-first Congress—S. 2751, Senator Sheppard. Reintroduction of above.

H. R. 2408, Representative Dyer. Reintroduction of above.

Seventy-second Congress—S. 182, Senator Sheppard. Reintroduction of above.

H. R. 353, Representative LaGuardia. To provide penalties for use of the mails for gambling devices and lottery paraphernalia.

H. R. 7537, Representative LaGuardia. Reintroduction of above.

S. 2570, Senator Sheppard. Reintroduction of above.

Seventy-third Congress—S. 3076, Senator Copeland. Denying transportation in interstate commerce and transmission through the mails of gambling devices.

S. 2559, Senator Reynolds. Providing against transportation in interstate commerce and use of the mails to gambling devices and lottery paraphernalia.

Seventy-fourth Congress—S. 6, Senator Copeland. Reintroduction of above.

Seventy-fifth Congress—H. R. 4796, Representative Sachs. To amend the criminal code to prohibit the importation and interstate transmission of gambling devices.

Seventy-sixth Congress—H. R. 7464, Representative Geyer. To prohibit the transportation and receipt of gambling devices in interstate and foreign commerce.

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 8, 1947.

In the Matter of Charges That the

MONARCH SALES COMPANY

at

Chicago, Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/371

SPECIFICATION OF CHARGES AND MEMORANDUM RECOMMENDING THE ISSUANCE OF A CITATION TO SHOW CAUSE WHY A FRAUD ORDER SHOULD NOT BE ISSUED.

It is charged that the above named concern is engaged in conducting a scheme for the distribution of prizes by lot or chance, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336, which said scheme is in substance and effect as follows:

Said concern is obtaining remittances of money through the mails as the purchase price of punches which are in effect lottery tickets entitling the buyer to participate in the awarding of prizes by lot or chance through the operation of so-called punch boards containing said punches or lottery tickets, which are furnished to respondent's agents who are authorized in respondent's name and be-

half to sell said punches or lottery tickets entitling the purchasers to chances on the prizes offered by respondent and named upon respondent's punch boards, such agents being authorized to promise and warrant in behalf of respondent that said prizes named and offered upon said punch boards will be awarded to the ticket holders whose punches or tickets bear the winning names which are concealed under seals affixed to the punch boards furnished to respondent's agents, said agents being required to remit the purchase price of said punches or tickets before being supplied with the prizes aforesaid for delivery to the winners of the lotteries which are thus conducted by respondents through its agents, and the winners whereof are determined by the respondent by selecting and affixing under the seals on said punch boards the names to be awarded the prizes, which said punch boards, circular matter and instructions sent to agents and soliciting agency for the purpose of conducting said lotteries by means of and through the United States mails are more fully set forth and described in the photostatic reproductions thereof hereto attached.*

I, therefore, recommend that the said concern be called upon to show cause why a so-called fraud order should not be issued against the Monarch Sales Company and its officers and agents as such at Chicago, Illinois.

/s/ William C. O'Brien
Attorney in Charge
Fraud Section.

To the Solicitor

Of the Post Office Department.

*NOTE by Appellee: The photostatic reproductions attached to above, are identical in all basic respects with the exhibits in the instant case. (R. 7 through 18).

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 30, 1948.

In the Matter of Charges That the

MONARCH SALES COMPANY

at

Chicago Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/371

ORDER

The Government having voluntarily filed with the Chief Trial Examiner a request for the dismissal without prejudice of the complaint in these proceedings;

IT IS ORDERED that said request be and hereby is granted without prejudice.

(Signed) Daniel J. Kelly
Chief Trial Examiner

Entered at Washington, D. C.,
January 30, 1948.

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 13, 1947.

In the Matter of Charges That the

HURON SALES COMPANY

at

Chicago, Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/374

SPECIFICATION OF CHARGES AND MEMORANDUM RECOMMENDING THE ISSUANCE OF A CITATION TO SHOW CAUSE WHY A FRAUD ORDER SHOULD NOT BE ISSUED.

It is charged that the above named concern is engaged in conducting a scheme for the distribution of prizes by lot or chance, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336, which said scheme is in substance and effect as follows:

Said concern is obtaining remittances of money through the mails as the purchase price of punches which are in effect lottery tickets entitling the buyer to participate in the awarding of prizes by lot or chance through the operation of so-called punch boards containing said punches or lottery tickets, which are furnished to respondent's agents who are authorized in respondent's name and behalf to sell said punches or lottery tickets entitling the

purchasers to chances on the prizes offered by respondent and named upon respondent's punch boards, such agents being authorized to promise and warrant in behalf of respondent that said prizes named and offered upon said punch boards will be awarded to the ticket holders whose punches or tickets bear the winning names which are concealed under seals affixed to the punch boards furnished to respondent's agents, said agents being required to remit the purchase price of said punches or tickets before being supplied with the prizes aforesaid for delivery to the winners of the lotteries which are thus conducted by respondents through its agents, and the winners whereof are determined by the respondent by selecting and affixing under the seals on said punch boards the names to be awarded the prizes, which said punch boards, circular matter and instructions sent to agents and soliciting agency for the purpose of conducting said lotteries by means of and through the United States mails are more fully set forth and described in the photostatic reproductions thereof hereto attached.*

I, therefore, recommend that the said concern be called upon to show cause why a so-called fraud order should not be issued against the Huron Sales Company and its officers and agents as such at Chicago, Illinois.

/s/ William C. O'Brien
Attorney in Charge
Fraud Section.

To the Solicitor

Of the Post Office Department.

*NOTE by Appellee: The photostatic reproductions attached to above are identical in all basic respects with the exhibits in the instant case (R. 7 through 18).

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 30, 1948

In the Matter of Charges That the

HURON SALES COMPANY,

at

Chicago, Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/374

ORDER

The Government having voluntarily filed with the Chief Trial Examiner a request for the dismissal without prejudice of the complaint in these proceedings;

IT IS ORDERED that said request be and hereby is granted without prejudice.

(Signed) Daniel J. Kelly
Chief Trial Examiner

Entered at Washington, D. C.,
January 30, 1948.

Calendar No. 879

82D CONGRESS
1st Session

SENATE

REPORT
No. 928

PROHIBITING THE IMPORTATION, TRANSPORTATION, AND MAILING OF GAMBLING MATERIALS, BROADCASTING OF GAMBLING INFORMATION, THE TRANSMISSION OF BETS BY MEANS OF INTERSTATE COMMUNICATIONS, AND INTERSTATE TRANSPORTATION OF CERTAIN GAMBLING DEVICES

OCTOBER 8 (legislative day, OCTOBER 1) 1951.—Ordered to be printed

Mr. O'CONOR, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany S. 1624]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 1624) to prohibit the importing, transporting, and mailing of gambling materials; to prohibit the broadcasting of gambling information; to prohibit the transmission of bets or wages by means of interstate communications; and to prohibit further the transportation of gambling devices in interstate commerce, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

GENERAL STATEMENT

This bill was sponsored by the Special Committee To Investigate Organized Crime in Interstate Commerce as a major item in their program of proposed anticrime legislation. This bill is being reported together with two others (S. 1563 and S. 1564). It combines changes in existing laws with several new features, all aimed at Federal control of the interstate commerce aspects of organized crime as exposed by the special committee.

The improvements in the present law which are proposed herein are designed to supplement the law-enforcement activities of the several States and local communities. Legislation which closes the channels of interstate commerce to gangsters and racketeers who are now fattening on the illegal gambling industry has nothing to do with local prerogatives in this field; only by shattering existing multi-State syndicates can their segments be brought within the practical enforcement reach of local authorities. And this, Congress alone can do.

PURPOSE

S. 1624 revises the lottery law (act of May 2, 1895) to include within its prohibitions other gambling enterprises, and punchboards and pushboards designed for gambling; similarly it extends the present ban on broadcasting lottery information to include information relating to other gambling enterprises; it imposes a new restriction on the use of interstate communications facilities to transmit bets or wagers; and broadens the controlling definition in the Slot Machine Act of 1951 (Public Law 906, 81st Cong.) to tighten administration of that act.

SECTIONAL ANALYSIS

SECTION 1

Section 1 amends chapter 61 of title 18, United States Code, presently entitled "Lotteries" (18 U. S. C. 1301–1305), in its entirety, with a new title, "Lottery and Gambling Enterprises." The new chapter consists of seven sections.

The first of these, section 1301, consolidates the present prohibition against importing or shipping lottery devices in interstate commerce (18 U. S. C. 1301) with the present prohibition against mailing the same (18 U. S. C. 1302), and adds the words "gambling enterprise" throughout. The words "or similar scheme," i. e., schemes similar to lotteries and gift enterprise, are changed to read "scheme of any kind," so that the controlling definition will read, whenever it appears, "gambling enterprise, lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance." This new controlling definition is broad enough to bring illegal bookmaking and all other types of organized, nonsocial gambling within the purview of the statute. It will subject all professional gamblers to the limitation now imposed on lottery operators by confining all alike to exclusively intrastate bases of operation.

Subsection (a) of the new section 1301 closes the mails and interstate commerce to shipments, communications, receipts, offers, payments, and advertisements or solicitations relating to any enterprise or scheme coming within the controlling definition. The former penalty ($1,000 fine and/or 2 years' imprisonment) is retained. Offenses must be committed "knowingly" so that innocent carriers and agents will not be affected. The ban on advertisements, which affects reports in the general press, has been clarified by adding the words "to be," so that only reports of "prizes to be drawn or awarded" are affected, and legitimate news stories of results after the event are not interfered with. Punchboards and pushboards suitable for gambling, which the Crime Investigating Committee found to be widely distributed through organized crime channels, are included subject to the definition in subparagraph (d) discussed below.

Subsection (b) carries forward the prohibition and penalties directed against receipt of lottery materials imported or shipped in interstate commerce, presently contained in the law (18 U. S. C. 1301), with no substantive changes. The committee did not wish to reduce the scope of the present law in any way; on the other hand, it was not considered necessary to subject recipients of the newly proscribed material to penal sanctions. So subsection (b) retains the controlling

definition of the present law and merely reenacts the substance of the existing provision in toto.

Subsection (c), based on a recommendation made to the committee by the Post Office Department, gives that Department direct enforcing authority, to refuse to accept any material banned from the mails under subsection (a) and to withdraw the same in the event that it is discovered in the mails. This is a logical addition, consistent with the purposes of the bill and in accord with the authority of the department with respect to other objectionable matter, e. g., obscenity, in the mails.

Subsection (d) was inserted to qualify the absolute ban on punchboards and pushcards originally contained in subsection (a). The committee was convinced, by testimony taken at its hearings, that there is a valid distinction between boards manufactured as out-and-out gambling devices and amusement types, such as quiz boards. The former, according to the findings of the Crime Investigating Committee, have been frequently used like slot machines and other "location" gambling devices, by racketeering gangs who force them on retail outlets, sometimes by terroristic methods, as a means of collecting tribute. The latter, however, are innocuous and wholly incapable of any significant gambling or gangster use; the committee feels that possible end-use, through alteration of innocent types of boards by distributors or location owners, is a problem remote from the interstate responsibilities of Congress, and one appropriately left to local enforcement authorities. The two are separated by means of a carefully worked out definition. The basic functional distinction is that gambling boards must have numbers or amounts on each slip punched, while game and quiz boards have only a numerical key (i. e., consecutive numbering) to an accompanying answer sheet, or, in some types, no numbers at all, on the slips. This test is used, with the additional safeguard, to avoid ingenious evasions, that the latter must also be "designed and manufactured primarily for amusement purposes" to fall within the exclusion. The words "or similar device," originally used to modify "punchboards and pushcards" in subsection (a), have been deleted therefrom and carried into this definition, where they modify "such boards" and "cards," to make it plainer that only devices structurally and functionally similar to punchboards and pushcards are intended to be included.

The new section 1302 reenacts the present section (18 U. S. C. 1303), which imposes a special penalty ($100 fine and/or 1 year's imprisonment) on any postmaster or postal employee who acts as a lottery agent or knowingly violates the mail prohibitions imposed in subsection (a) of section 1301 (presently 18 U. S. C. 1302)—with the new controlling definition inserted so that the section, as reenacted, will be coextensive with subsection (a) as revised. The words "to be" are inserted before "drawn or awarded" to make the same clarification noted in subsection (a) supra.

The new section 1303 reenacts the present section (18 U. S. C. 1304), which makes it a criminal offense ($1,000 fine and/or 1 year's imprisonment) for any person to broadcast over a licensed radio station; or for any licensed broadcaster knowingly to permit broadcasting of any lottery information—with the new controlling definition inserted so that the section, as reenacted, will be coextensive with subsection (a) of revised section 1301. The words "to be" are

inserted before "drawn or awarded" to make the same clarification noted in subsection (a), supra.

The new section 1304 is an innovation, making it a criminal offense ($1,000 fine and/or 1 year's imprisonment) for any person "knowingly" to send or transmit in interstate or foreign commerce, by wire or radio, any bet, offer of a bet, or order for payment of a bet. This provision is directed at the "lay-off" and "come-back" betting operations of professional gamblers and bookmakers, and is an important point in the Crime Investigating Committee's program to drive organized crime out of interstate commerce. The committee strongly endorses the provision, but with a cautionary note that it is not directed at the casual, social bettor, and is not intended to loose a multitude of prosecutions on private citizens who have no connection with the professional gambling empires. No drafting technique seemed in anywise adequate to differentiate the latter in the statute itself; the matter is therefore left to sound discretion at the enforcement level, with reference to the maximum de minimus non curat lex and to analogous policies with respect to other similar laws, e. g., the Mann Act.

The new section 1305 reenacts the present section 1305 (18 U. S. C.) which exempts nonprofit fishing contests from the provisions of the chapter, with a new limitation that the exemption shall reach only "the sponsorship, management, or advertisement" of such contests. Without this limitation such contests might be made the basis of unlimited lottery or bookmaking operations, to defeat the expanded prohibitions contained in the new sections 1301 and 1304; with it, section 1305 still gives full protection to all legitimate activities directly related to such contests but affords no immunity in relation to gambling schemes based thereon by outsiders.

The new section 1306 is an exemption to protect the race tracks which are now lawfully operated, usually with legalized pari-mutuel betting, in 26 States. This industry, sanctioned by a majority of the States and important as a source of tax revenues, would have been severely hampered without such an exemption. The track managements are fully answerable to State laws and regulations, and have not been shown to be in any way connected with the illegal interstate gambling organizations which are the primary concern of the committee, the Congress, and the Federal Government. The same limiting phase used in section 1305, supra, "sponsorship, management, or advertisement," is used to make certain that, while the track managements themselves are left wholly free to conduct their operations and to employ contractors, suppliers, advertisers, etc., no stranger can claim immunity for prohibited activities merely because they are based on such track racing.

The new section 1307 was inserted at the suggestion of the Department of State, which pointed out to the committee that many reputable foreign publications would be barred from circulation in this country under the terms of section 1301 as revised, by virtue of their prohibiting news items about gambling enterprises in their own countries, e. g., the Irish Sweepstakes, the Loterie Nationale, etc. The practical consequences of circulating such items, carried in bona fide foreign publications, would seem singularly trifling; the loss, if such publications were withheld from American readers for this reason, would be great. The exemption is carefully restricted to

avoid abuses; the publication must be "distributed as a bona fide medium for news, information, or opinions" in a foreign country before it is eligible for this dispensation.

SECTION 2

The second section of the bill writes a new, simple definition into the Slot Machine Act of 1951 (act of January 2, 1951, 64 Stat. 1134). The Crime Investigating Committee found that this act, designed to control the interstate shipment of slot machines, which are a major item among the paraphernalia of gangster-gamblers, was being flaunted because the controlling definition therein was overtechnical. The prohibited machines had either to contain a "chum or reel with insignia thereon" or be "operated by means of the insertion of a coin, token, or similar object." New machines, designed to avoid these criteria, appeared almost at once. Moverover, the Crime Investigating Committee was impressed with the adaptability of certain types of pinball machines as perfectly equivalent substitutes for slot machines. These can be constructed to pay off in cash, like the slot machine, or to record amounts won, by a device known in the trade as a knock-off button, so that the operator and the location owner have a precisely recorded basis for dividing the profits from the machine. The committee feels that a generic description of all mechanical gambling devices of this type, including, at the suggestion of the Crime Investigating Committee, roulette wheels and similar devices, should be substituted for the present controlling definition in the act. That is what section 2 of the bill accomplishes.

The new definition would not affect the amusement-type pinball machine which pays off only in "free games" and has no device to record winnings, under the judicial holding that the mere right to play the device further is not a thing of value. *Washington Coin Machine Assn.* v. *Callahan* (142 Fed. 97 (C. A. D. C., 1944)).

A proviso was inserted at the end of the definition, as revised, to make certain that totalizers and other pari-mutuel equipment would not be included therein.

In view of this proviso, the language including roulette wheels and similar devices was changed from a parenthetical inclusion to an unqualified enumeration; to minimize the effects of the doctrine of inclusio unius est exclusio alterius. The committee believes that this change will make it possible to exclude most of the simple games and devices which are characteristic of itinerant carnivals, as the Crime Investigating Committee recommended, since the latter have no connection with organized illegal gambling, are allowed to operate in many States, and are primarily identified with the service of charitable and other worthy causes.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, U. S. CODE

CHAPTER 61—LOTTERIES

[1301. Importing or transporting lottery tickets.]
[1302. Mailing lottery tickets or related matter.]
[1303. Postmaster or employee as lottery agent.]
[1304. Broadcasting lottery information.]
1301. Importing, transporting, or mailing gambling or lottery materials
1302. Postmaster or employee as gambling or lottery agent
1303. Broadcasting gambling or lottery information
1304. Transmission of bets and wagers by telephone, telegraph, or radio
1305. Fishing contests
1306. Public track racing events
1307. Bona fide foreign publications

[§1301. Importing or transporting lottery tickets

[Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

[§ 1302. Mailing lottery tickets or related matter

[Whoever knowingly deposits in the mail, or sends or delivers by mail:

[Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

[Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

[Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

[Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes—

[Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.]

§ 1301. Importing, transporting, or mailing gambling or lottery materials

(a) Whoever knowingly brings into the United States for the purpose of disposing of the same; or whoever knowingly deposits with any express company or any other carrier for compensation or carries in interstate or foreign commerce; or whoever knowingly deposits in the mail, or sends or delivers by mail—

any letter, package, postal card, or circular concerning any gambling enterprise, lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance;

any gambling or lottery ticket or part thereof; or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of any gambling enterprise, lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance;

any punchboard or pushcard;

any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such gambling enterprise, lottery, gift enterprise, or scheme, or for the purchase of, or in payment of any chance taken on, any punchboard or pushcard;

Any letter, package, postal card, or circular containing any bet or wager, any offer of any bet or wager, or any check, draft, bill, money, postal note, or money order in payment of any bet or wager in connection with any gambling enterprise,

lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance; and

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of, or soliciting any business in connection with, any gambling enterprise, lottery, gift enterprise or scheme of any kind, offering money or other prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes to be drawn or awarded by means of any such gambling enterprise, lottery, gift enterprise, or scheme, whether such list contains any part or all of such prizes, or containing any advertisement of any punchboard or pushcard—

shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

(b) Whoever knowingly takes or receives any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of, the prizes to be drawn or awarded by means of any such lottery, gift enterprise, or similar scheme, which have been brought into the United States or deposited with any express company or any common carrier for carriage, or carried in interstate or foreign commerce, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

(c) All matter, the mailing of which is forbidden by subsection (a) hereof, is hereby declared to be nonmailable and shall not be conveyed in the mails nor delivered from any post office, nor by any letter carrier, but shall be withdrawn from the mails under such regulations as the Postmaster General may prescribe.

(d) For the purposes of this section the phrase "punchboard or pushcard" shall include such boards, cards or similar devices designed and manufactured primarily for use in connection with gambling, but shall not include devices numerically keyed to an answer sheet or containing no numerical identification of individual plays and designed and manufactured primarily for amusement purposes.

[§ 1303.] § 1302. Postmaster or employee as *gambling or* lottery agent

Whoever, being a postmaster or other person employed in the postal service, acts as agent for any *gambling or* lottery office, or under color of purchase or otherwise, vends *gambling or* lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any *gambling enterprise*, lottery, gift enterprise, or [similar] scheme[,] *of any kind* offering *money or* prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any *such gambling enterprise*, lottery, gift enterprise, or [similar] scheme, [offering prizes dependent in whole or in part upon lot or chance,] or any list of the prizes *to be drawn* awarded by means of any such *gambling enterprise, lottery, gift enterprise, or* scheme, *whether such list contains any part or all of such prizes,* shall be fined not more than $100 or imprisoned not more than one year, or both.

[§ 1304.] § 1303. Broadcasting *gambling or* lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisment of or information concerning any *gambling enterprise*, lottery, gift enterprise or [similar] scheme[,] *of any kind* offering *money or* prizes dependent in whole or in part upon lot or chance, or any list of the prizes *to be* drawn or awarded by means of any such *gambling enterprise*, lottery, gift enterprise, or scheme, whether *such* said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

§ 1304. Transmission of bets and wagers by telephone, telegraph, or radio

Whoever knowingly sends or transmits, or causes to be sent or transmitted, in interstate or foreign commerce by means of telephone, telegraph, or radio any bet or wager, or any offer of any bet or wager, or any money or money order in payment of any bet or wager, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each sending or transmission shall constitute a separate offense.

§ 1305. Fishing contests

The provisions of this chapter shall not apply with respect to *the sponsorship, management, or advertisement of* any fishing contest not conducted for profit wherein

prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event.

§ 1306. Public track racing events

The provisions of this chapter shall not apply with respect to the sponsorship, management, or advertisement of any track racing event to which the general public is admitted and upon which betting is legal under applicable State laws.

§ 1307. Bona fide foreign publications

The provisions of section 1301 of this chapter shall not apply with respect to the importation and distribution of any foreign newspaper, pamphlet, or other publication distributed as a bona fide medium for news, information, or opinions in any foreign country.

TITLE 15, U. S. CODE, SECTION 1171

(Prohibiting transportation of gambling devices in interstate and foreign commerce)

SEC. 1 (a) The term "gambling device" means—

(1) Any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as a result of the application of an element of chance, any money or property; or

(2) any *other* machine or mechanical device *and roulette wheels and similar devices* designed and manufactured [to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that] *primarily for use in connection with gambling and (A) which* when operated [it] may deliver, as the result of the application of an element of chance, any money or property [;], or *(B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property, provided that the provisions of this section shall not apply to pari-mutuel betting equipment or materials used or designed for use at race tracks where betting is legal under applicable state laws.*